No. 12412

United States
COURT OF APPEALS
for the Ninth Circuit

HALESTON DRUG STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY BRIEF

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Respondent's position in its Brief before the Court appears to be based upon the proposition that the Board had the right to dismiss the complaint filed by the Petitioner on an unfair labor charge because it did not effectuate their own policy rather than the policy of the Labor Management Relations Act, 1947. The Board dismissed the complaint on the ground that it would

not effectuate the policy of the Act to take jurisdiction. However, at no place in their Brief can be found any statement as to what policy of the Act would not be effectuated. The policy of the Act is very minutely defined in Section 1 (b) and in Section 101, Section 1. The Act particularly legislates against the practices set forth in the complaint where the Act says:

> "Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed."

This policy of the Act very definitely provides against practices which have the intent or necessary effect of burdening or obstructing commerce by preventing the free flow of goods in commerce through strikes, etc. That is what they were doing in the case before the Court by the placing of pickets before the places of business of the Petitioner. They most certainly were obstructing commerce by preventing the free flow of goods in such commerce to the Petitioner's place of business.

Respondent, however, has intimated in its Brief that the policy of the Act would not be effectuated because the relation of Petitioner's business to commerce was remote and insubstantial. Petitioner submits that this argument is untenable. Petitioner's position in this case

is that Petitioner has never had a hearing to determine whether the relation of Petitioner's business to commerce was substantial or insubstantial. There is no evidence whatever in this case to substantiate any finding of any kind as there never was a hearing. The Board summarily dismissed the complaint without a hearing and without any evidence being taken from which it could be determined whether the practices of the Union would have any substantial effect upon the free flow of Petitioner's interstate commerce. Consequently, you have a decision based entirely upon a case where there is no evidence whatever. Respondent is attempting to bolster its decision by referring to a previous case, case No. 36 RM 26. This case was between different parties and concerned a different subject matter. It was on a petition for an election filed by the employer, Haleston. The Union in the case before the Court was not involved in that case. Further, the Petitioner in that case had no right of appeal or review since it was a representative case and the Act does not give a right of review or appeal from the decision of the Board; Section 9, Labor Management Relations Act, 1947. Surely each case must stand on the evidence deduced at the trial of that case. The case before the Court covers a different period of time and Petitioner was prepared to prove additional facts with reference to commerce as to whether the commerce feature of the Act was substantial or not. We, therefore, submit to the Court that the previous case is not binding on the Petitioner in this case and should not be used as evidence in this case where the Petitioner had no opportunity to introduce additional evidence.

The policy that the Respondent seems to be depending upon is not one set forth in the Labor Management Relations Act, 1947, but seems to be based more upon the whim of the Board. In other words, the Board seems to be following a policy of deciding under the same state of facts whether they will take jurisdiction or not. In one case they take jurisdiction, and in the other they say it would not effectuate the policy of the Act to take jurisdiction. This is very forcibly demonstrated in the Automobile Dealers cases cited by Petitioner which arose in this District. The dealers involved were all local dealers from a small community in the State of Oregon. Their businesses were absolutely local in character as they sold nothing outside of the State of Oregon. Their purchases from out of state were comparable to those of Petitioner's. Yet, in each of these cases, the Board exercised jurisdiction. If this position is sound, you have an anomalous position, resulting in nothing but confusion. No one, employer, employee, or Union, is going to be able to rely on any state of facts as bringing them within the purview of the Act. They have to gamble wholly upon the whim of the Board. We submit that Congress did not intend that any such confusion should arise and that the Board should have the right to act capriciously. Congress must have intended that every case with the same facts should be decided in the same way.

This decision of the Board is further proved to be based upon a policy of their own by the arguments of the Respondent in its brief that the Board did not have sufficient funds to carry on the case load that they have

and they should, therefore, have the right to take jurisdiction only in those cases which they consider to be of more importance. There is nothing in the decision of the Board in which they state that it is their own policy they are giving effect to rather than the policy of the Act. There is no evidence before this Court to the effect that they did not have sufficient funds to take care of all the cases. The first we hear of this is in Respondent's Brief where it is argued at considerable length that the Board should have the right to refuse jurisdiction in a case that does not seem so important to them because they do not have sufficient money to try all of them. This is not a judicial question for this Court, but should be directed to the attention of Congress. Petitioner submits to this Court that the seeming importance or non-importance of a case has never been a factor in the decisions of our Courts where substantial rights are involved. Although a case may seem to be unimportant as against another case involving more money, it may be very important to the litigant who is having his substantial rights passed upon. He should have the same consideration as any other litigant. The Courts of this country have always treated all persons alike whether large or small, important or unimportant, as long as substantial rights are to be determined.

Petitioner, therefore, submits to this Court that if Petitioner's business is in interstate commerce and the practices of the Union tend to substantially interfere with the free flow of his commerce, the Board has jurisdiction whether it wants to take jurisdiction or not, and it is incumbent upon the Board to hold a hearing to

determine whether these facts are true or not from the evidence. To allow the Board to carry out a policy whereby it can refuse to take jurisdiction in one case and assume jurisdiction in another case where the facts are the same, would violate all legal principles.

Respectfully submitted,

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Attorneys for Petitioner.